(1) Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

J. ROBERT HOBGOOD, PETITIONER

VS.

KOCH PIPELINE SOUTHEAST, INC.,
RESPONDENT

On Petition for Writ of Certiorari
To The Mississippi Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the state court proceedings, if improper, take private property without compensation and generally infringe upon citizen immunities?

ISSUES PRESENTED IN STATE COURTS

1. Whether general language in a grant "to construct, maintain and operate pipelines" can be construed in easement law to convey unspecified general rights of use.
2. Whether in making changes in a right of way a pipeline company owes no duty to accommodate the landowner in his exercise of rights.
3. Whether the issue of subsequent remainder damages is wholly a question of law.
4. Whether the Petitioner was afforded due process when the Chancellor denied him a continuance he sought in order to prepare the case properly.

ISSUE FROM COURT OF APPEALS

Whether the Rules of Civil Procedure and Rules of Appellant Procedure, as interpreted herein, afford due process and adequate protection for property rights under the constitution.

TABLE OF CONTENTS

Page

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL REFERENCES..... 1

STATEMENT OF THE CASE 2

SPECIFIC ISSUES..... 3

THE GENERAL ISSUE..... 8

JUDICIAL AUTHORITY 14

PLAIN TALK ABOUT LAW 17

CONCLUSION AND PRAYER 25

APPENDIX A..... 27

APPENDIX B..... 45

APPENDIX C..... 52

TABLE OF AUTHORITIES

Capital Electric v Hinson, 226 Miss. 450, 84 So.2d 409 ..... pg. 10

PETITION FOR WRIT OF CERTIORARI

J. Robert Hobgood petitions the Supreme Court of the United States for a Writ of Certiorari to the Mississippi Court of Appeals.

OPINIONS BELOW

The Court of Appeals opinion is reported at _____ (2000 Westlaw 291624) and is reproduced as Appendix A.

The Chancery Court's Order of Partial Summary Judgment is unreported and is reproduced as Appendix B.

JURISDICTION

The Supreme Court of Mississippi denied a Petition for Writ of Certiorari. Its denial was filed July 27, 2000. The jurisdiction of this court is invoked under Title 28 U.S.C. 1257.

CONSTITUTIONAL REFERENCES

Reference is made herein to the constitution as a whole. As a whole the constitution is deemed a legal act or deed. The document grants specific powers for limited purposes, creating a national government with limited powers to act, and reserves to the grantors, identified as We the

People, the powers not "delegated." Petitioner relies on the constitution as a whole in order to question the general authority of courts.

Amendment X expressly reserves the powers not delegated.

Article IV, Section 2 and Amendment XIV, Section 1 expressly protect citizen "Privileges and Immunities" generally. Petitioner relies upon the general protection afforded thereby and also relies upon the specific provisions of XIV 1 that expressly protect private property.

Petitioner relies upon Amendment IX, respecting rights not enumerated, and upon the protection of Amendment VII, which expressly pre-empts the power of judges to decide issues of fact.

STATEMENT OF THE CASE

This case relates to a change in the use of an old pipeline right of way and to two distinct interpretations of the 1941 easement deed. The pipeline company, Koch Pipeline Southeast, Inc., claimed the deed was a multi-line easement grant. Petitioner raised questions about the Koch interpretation. Litigation ensued. Petitioner contends his questions were basic to a proper consideration of the Koch claim and must necessarily be addressed.

The Chancellor favored the Koch interpretation and entered summary judgment on

the basis that "clearly" the deed granted Koch the rights it claimed. The Court of Appeals found "no ambiguity" in the deed. Petitioner questions this unquestionable "clarity" and the indulgent proceedings. He also challenges the lack of consideration of correlative rights.

SPECIFIC ISSUES

One of the easement issues raised by this case is an issue of first impression. That is the issue on subsequent remainder damages.

Remainder damages are actual compensative damages commonly recognized under Mississippi law incident to the acquisition of new right of way. Are subsequent unforeseeable remainder damages compensable only at the time of the original grant if the interest acquired is only a right of use? Petitioner wants to be heard on this matter. He contends the courts' denial of a jury trial on this kind of actual damages abridged his constitutional right to have a jury try issues of fact.

Petitioner further contends that the review of the issue on appeal did not afford due process generally. The Mississippi Supreme Court hears cases of first impression. It could have heard this case directly since it presents an issue not previously addressed. At a minimum the Mississippi Court of Appeals should have allowed

oral argument. The Court of Appeals considered the case only on briefs.

Did the court really need the interaction that attends oral argument? Theories of law are the theories of intelligibility, how matters are cognizable in law. Considerable acumen is required to sort out the intelligibility of things in law. The challenging task to grasp the theory underlying a cause of action is illustrated elsewhere in this case. On the matter of the depth of the pipeline the court mistakenly construed it in contract terms rather than in terms of property rights.

Briefs are important but they do not replace the need for oral argument, and oral argument should not be deemed sufficient to address the need of litigants to interact with courts. Changes are needed. Too many bad court decisions occur under current practices. This case illustrates the problem. Better interaction in briefing at all levels is a pre-requisite of more efficient use of oral argument. Petitioner's effort to that end were ignored.

The Mississippi Rules of Appellant Procedure expressly allow a court to reverse on appeal for failure to brief. The Respondent argued generalities in its brief and did not specifically address this issue notwithstanding the importance of the issue to the pipeline industry. It should have addressed the issue fully and directly in an intelligible reviewable form.

In general terms, the Koch brief did not brief. It did the opposite; it misinformed, making consideration more complex and difficult. Is this any way to run a judiciary?

The American judicial system is not wholly an adversarial system, not in the constitutional scheme of limited government. Judges have responsibilities too. Otherwise, justice is a choice between competing views of law. No, it is less than that. Justice becomes whatever the judge declares it to be. Glibness and silver-tongued lawyers and backroom payments become an accepted part of the system.

The Court of Appeals should have acted on its own initiative to compel the Respondent to present in its brief whatever controlling considerations were necessary to address the issue in law. It did not. The Court of Appeals should have heard Petitioner's motion to strike the Respondent's brief for failure to brief the issue. It did not. Is the Petitioner alone in his concern for the way lawyers and jurists conduct themselves in this regard? Is what happened here not too much the standard fare? Does law truly measure up to law?

The court addressed at length a different issue of first-impression even though it was an incidental technical matter but there is no evidence that any consideration was given to the issue of first impression presented by the Petitioner, the

substantive issue of whether remainder damages are actually damages. Petitioner was literally denied a hearing on an issue for which there was not actually any prior legal authority to rule. Then the Court ruled on the issue using secretive reasoning.

There is no real secret to what happened. From all that record reveals one can say the court simply chose to ignore the issue. Does the constitution allow courts to ignore issues at will? Is there some inherent power in law to talk passed people?

The other two easement issues are not issues of first impression. They are distinguishable for precisely the opposite reason. The controlling considerations are matters of basic easement law addressed in any major treatise on property law. Moreover, these precise issues have previously been decided in another Mississippi case.

In *Capital Electric v Hinson*, 226 Miss. 450, 84 So.2d 409 the Mississippi Supreme Court held that the grant of a right of way easement in general terms is not to be construed to convey general rights. The court also affirmed correlative rights of the landowner, including the right of the landowner to determine location when location is not otherwise specified.

The *Capital Electric* case is not some obscure case. It was reviewed in depth in *Ashcot,*

Inc. v. Texas Eastern Transmission Corp., 241 Miss. 392, 396, 129 So. 2d 405, 407 (Miss. 1961), a multi-line easement case relied upon by Koch, Chancellor Teel and the Court of Appeals. The *Capital Electric* case was also not based upon twisted logic. The court relied extensively on the authority of property treatises as well as case law.

The plot thickens here. First Petitioner's questions were ignored and his sense of case law left unexplored. Now here controlling legal authority was ignored. Is this standard fare in American courts?

Judges judge. Judges also err. The authors of the constitution viewed judicial error as a source of great concern. Protection put into the constitution included limiting the authority of courts. The rule of law was to prevail. Judges were not given general powers of decision-making. Judges were obliged to honor citizen privileges and immunities generally. Conversely, judges were to adhere strictly to law. Still today judges give Americans cause for concern.

If in this case the court had a duty to follow rules and render the judgment dictated by law, how is one to construe intelligently the judicial act herein? In what ways can one makes sense of the judgment? The chancery court is a court of record. The predicate upon which judgment was rendered is reviewable. The purpose of an appellate process is to review. How does law explain itself?

There is a real problem in this case with the basics, beginning with what it means to follow the law. Is the rule of law unbridled? If the judicial power is limited, what limits the courts generally? What reigns in the courts all the time? Petitioner complains that his property has been taken. Is law itself not a license for theft?

What more profound and pervasive problem exists in law today if it is not the waning respect people have for the legal profession? Petitioner has been slapped in the face, awoken anew to the problem. If courts cannot get it right in a little professional controversy over property rights, how is the judicial process fair? Why is not the legal dynamics at play in our courts not a cancer in our society?

THE GENERAL ISSUE

Abuse of the judicial system is as close as any judge on the take, an elected or partisan judge who brings political baggage into the courtroom or a monied person with the resources to buy the best representation and to endure the most arduous trial process. But the most common exposure to the abuse of judicial process which citizens face is that arising from the judge's sense of the case.

We here assume that Koch has not acted improperly. We have reason to assume as much.

By ruling out consideration of corruption and favoritism we come to the real issues of the case, the substantive issues by which the case is considered on its merits. Law is rational in that way. But where are the real issues to be found?

Respondent presents a plain language view of a deed.

Petitioner presents an unassuming view of law.

In truth, the courts failed to lay a proper predicate of law in this case. This is not to suggest the Chancellor laid literally no predicate to support his judgment. This appeal is not an attack upon the competency of jurists individually or collectively. Likewise, it is not to suggest the Court of Appeals was consumed by politics and ideology or that Justice Southwick actually did find ambiguity in the language of the instrument when he said he did not. This appeal is not an attack upon the personal integrity of jurists individually or collectively. This appeal is also not a personal attack upon James Halford, whose relatives in Meridian, Mississippi, are salt of the earth. This case is an appeal to the integrity of law. How ought law to explain itself? How ought law to be viewed?

Respondent's strength, an unadorned reading of the deed, is its greatest weakness. Considerable legal argument was given to support this view of the easement and it passed muster at three levels of the judicial system. That is understandable enough.

It seemed on its face to be a multi-line easement. The granting clause purported to convey "the right of way and easement to construct operate and maintain pipelines" but in truth it was a view attributable to an untutored 9th grader, not a view that represented the sophisticated acumen of a pipeline company with an army of lawyers.

Pipeline company lawyers know better. Their multi-line easements spell it out. They know general language does not suffice. They know the limitation on the language of a grant is formidable. They know only the rights specified are granted. They know general terms that do not specify general rights do not do the job, not when the job is to write an acceptable multi-line easement deed.

The Koch claim of easement rights is not intelligible in law except in cursory fashion. It cannot stand up to scrutiny. It rests upon the premise that general terms specify general rights. That seems logical. The granting clause does not specifically limit the number of pipelines that could be laid and it does not specifically limit the product strictly to natural gas. It is on its face the grant of a simple easement with an unequivocal right to construct pipelines in the designated right of way. But what on a first reading seems logical is not logical in law. It begs the question.

In law it pays to ask questions. Logic especially must be questioned. Sometimes logic is deceiving. Sometimes what seems true is false.

Law requires a full consideration. The granting clause of the 1941 deed illustrates the point.

Upon a first reading of the granting clause one could say that the granting clause did not limit the number of pipelines that could be laid or limit the product strictly to natural gas. That is not exactly true. Upon a closer reading one must say something slightly different, that the granting clause did not *expressly* limit the number of pipelines that could be laid or *expressly* limit the product strictly to natural gas.

There are no *express* words to limit the use but it is not exactly true that no words limit the use. One word *in the granting clause* implicitly limits the use to natural gas. That is the word "easement."

The definition of the word "easement" was set forth in Chancellor Teel's ruling and the definition specifically excludes from the grant general rights of property. Chancellor Teel missed that little point, but he could not miss it without misconstruing easement law.

Easement rights are not general rights but expressly specified rights. By the nature of the interest conveyed the rights are limited. An easement is not a lease. It is a use. The right to use does not imply the right to possession, hence does not convey general rights that do come with possession. The right is to use the land of another. One has no right to use another's land without

permission. One does not have general rights by implication from the grant of a specified use.

To get a perspective upon the notion of a general easement by implication, consider the liar's paradox, "I always lie." The untruth is in the logic. Reasoning that the grant does not limit what is not granted indulges semantics to the point of absurdity. The reasoning is its own contradiction.

Unlike multi-line easements the general terms in the Koch grant did not convey unlimited or general rights because unlike multi-line easements the general terms did not expressly specify unlimited or general rights. That is not necessarily how one reads the easement on a first reading but it is that plain when one understands the finer points of easement law.

Respondent argues "express" rights with abandon. The words "replacement" and "additional lines" are among the provisions of the deed and Respondent argues the rights are express as if the rights were not limited and did not have to be kept in a proper legal context. The argument was not well considered. Additional line rights are not literally an express grant contained in the deed. Replacement rights are incidental rights, not unqualified rights.

The intelligibility of loose argument is itself a source of concern herein. If Petitioner's analysis above of easement law is correct, does the prominence of loose argument in courts not say

something about the American judicial system? If generalities count as general terms, how is law not a license for theft and every other kind of injustice?

The test of law is a familiar test. It is employed in every review of a summary judgment. The test applies as well to the office generally. Courts do not enjoy positions of privilege. They do not possess general powers of decision-making and they do not possess unlimited powers of decision-making in matters over which they have general jurisdiction. The constitution vests only limited powers generally, and in vesting judicial power in courts the constitution limits the exercise of judicial power by the test of law.

Courts must follow the law. They must have some predicate upon which to act, some rational basis by which to explain their actions. It is not an elective. It is an impeachable offense for any office not to be bound by the federal constitution. State courts are limited by the federal constitution. State legislatures are limited too. State legislatures cannot grant state courts general powers of decision-making over people's property. The constitution specifically protects private property along with freedom of religion and freedom of speech. No state laws and no state court rules and no state court rulings can be counted as a basis or authority to take private property without due process and without compensation.

Courts must exercise considerable acumen in order to follow the law. The test by which law measures the claim of "express" rights illustrates the point well.

Words are not everything. In fact, the grant was for a natural gas pipeline. The circumstances of this case speak volumes about the difference an understanding of life makes in law. Common sense is enough to understand the importance of natural gas to country people in 1941. No doubt Koch's records are replete with evidence that the pipeline company assured people it had plans to use the pipeline to transport natural gas. Did any specific terms of the 1941 easement deed communicate to people gathered around their wood stoves with the right of way agent there could be something other than natural gas in the pipeline? General terms did not either.

The terms of the 1941 grant cannot be construed as a whole without consideration of what the terms do not do. Not one provision in the deed expressly expands the easement rights beyond the original use. Koch argues to the contrary but the argument is empty argument. Not one provision in the deed is contradicted by an interpretation that limits the easement rights to the original use. Hence the "express" rights Koch claims are not express rights in law. The Koch argument of "express" rights rests upon generalities that legal proceedings ought to expose.

JUDICIAL AUTHORITY

In plain language, sometimes courts need to be put in their place. This is such a time, if Petitioner's analysis of judicial authority is in point, inasmuch as Petitioner contends the courts have unwittingly assumed power to act apart from the dictates of law.

In more precise language the point is even clearer. Courts need to revisit their thinking about law. Courts are the ones uniquely situated to put their house in order.

Courts exercise "general authority" when a proper predicate in law is *not* laid. It is a corollary of limited judicial authority. It should be apparent from the record in any proceedings by a court of record that the court undertook to determine and follow the dictates of law.

From the start the courts *assumed* proper authority to say what rights and obligations Koch had to use the Hobgood land. The chancery court was a court of general jurisdiction, not limited jurisdiction. The Chancellor had general authority to act and had jurisdiction over the land, the person and the remedy. It followed, on the basis of the authority it assumed, that the courts were authorized by law to render judgment and by that judgment say what rights and obligations Koch had to use the Hobgood land. The courts erred in so

acting.

At every level the court indulged generalities. It acknowledged no difficulty sorting out generalities. It assumed too little obligation to sort out matters of law; it articulated no discernible dimension to hearings beyond listening to the arguments and authorities presented, then making a finding. It made no effort to evaluate the case other than in terms of the legal authorities it deemed credible. It acknowledged no discernible purpose to be served by sorting through all the words and coming to terms with the real situation. It expressed no willingness to question Mississippi law, revered case authority, unquestionably acceptable premises or fundamental legal principles.

As a result, the Chancellor assumed a different role, that of the grantor. He exercised "general authority" to control Petitioner's land. According to the scheme of the federal constitution, it was the role of the grantor to exercise general authority by execution of written deeds of his or her choosing, but in this case the Chancellor exercised the powers of a grantor. The Chancellor said Respondent had the right to construct a pipeline on Petitioner's land. The Chancellor said Respondent had the right to lay the pipeline at the depth it wanted. The Chancellor said Respondent could interfere with Petitioner's general property as long as it was not the cultivation of the land. In

exercising general authority over the land the court erred. Only the landowner had general authority over the land.

Law denies to judges the authority to rewrite the terms of a deed. The Chancellor and the Court of Appeals made that point. Yet the corollary is that judges do not have a say on what the deed says. The cases are quite clear on this point. The issue is the actual intent of the grantor, not which of several interpretations of a deed a judge deems most reasonable. Judges are governed by what the grantor says. The grantor's word is law.

The role the judge plays in searching out the actual intent of the grantor goes beyond property law to law generally. When judges render judgment they do not render their personal judgment. Judges say what the law says. The reverse should not be true. Law should not be whatever judges say. What judges say law says must have a demonstrable predicate in law.

Error occurred in the court's reasoning here. There were distinctions in law that were not maintained. Confusion resulted. The court confused the property rights of an easement holder with property rights in general. Property rights are property rights but not all property rights are necessarily general property rights. An easement holder does not literally own the land for the specified purposes of the easement and the easement holder does not actually possess the land

in a legal sense or otherwise have general rights to use the land unless the general rights are sufficiently specified to manifest the grantor's act of conveyance.

PLAIN TALK ABOUT LAW

Law sometimes has problems with distinctions in the gray areas, but it also has problems distinguishing black and white and adding 1 + 1 is no pushover when there is a problem discerning what counts.

One could readily understand how a judge might jump to the conclusion Koch suggests, that the deed makes express provision for additional pipelines, but the dynamics at work are the inferences that jurists deemed themselves at liberty to make, not the "express" implications that follow by law or by the necessary meaning of words.

This is not to suggest that an additional pipeline was not discussed. An additional loop line was laid underneath the river the next year and presumably was part of the plans discussed in 1941. Of what significance was an actual additional pipeline in 1942 to a proper interpretation of the 1941 deed? Was what happened later necessarily inconsequential? Hardly.

Logic is not necessarily unequivocally logical. Circumstances contribute a dimension to the consideration of the words in a deed not

otherwise apparent.

The 1941 deed conveys a pipeline easement. Provision is made for construction of "pipelines." Pipelines are pipelines, and logically pipelines means more than one pipeline but consider the circumstances and one sees a reality beyond the words.

Logically black is not white and 2 is not 1, but beyond the words here black was really white, logically speaking. "Pipelines" meant one pipeline notwithstanding the installation of an additional pipeline. How is that? Because the additional pipeline was a loop line. It was laid beneath the river and tied into the original pipeline on each side of the river. After the installation of an additional pipeline under the river the pipeline company did not have two pipelines, just one pipeline enhanced with a loop line at the river. The two pipelines were really just one pipeline, the one that delivered the gas.

The courts erred when the circumstances of this case were deemed inconsequential. Not only would the circumstances show that "pipelines" meant just one pipeline. The circumstances would also show that consideration was limited to one product, natural gas.

No judge could rule the circumstances were immaterial or without significance as a matter of law. Law may be rational when at its best but it is no more rational than mathematics at its best. Not

even mathematics is so logical that it adds up to demonstrable infallibility. [Godel's Theorem reputedly demonstrates the theoretical fallibility of mathematics by proof that no system of symbols can demonstrate its own inherently logical infallibility.] Mathematics does not refute irrational numbers; it employs them. Law does not get to choose to ignore.

This may come as a surprise to many in the legal profession but judges' discretion is always limited. Discretion must serve some cognizable *purpose in law*. If the judge exercises discretion generally, he or she has general authority and can act at will. This is precisely the power of decision-making that the authors of the constitution undertook to prescript. By the limitation of judicial powers written into the constitution precluding courts' consideration of fact issues judicial error was reviewable. The same effect was achieved by reserving to the citizenry the province of general judgment. When the rule of law prevails a predicate in law must be laid.

This case was not determined by considerations of law but by considerations other than of law. Petitioner defines those considerations as "general" considerations, those not ordained by the federal constitution, which limits the predicate of judicial judgment to rational considerations of law. This was in fact a natural gas distribution line. Koch's effort to put the land to a different use

played upon the dynamics of presumption or whatever, not upon a deliberate sustainable analysis of law. In a word, Koch was fudging.

Is plain language like "fudging" cognizable in law? Petitioner moved to strike Respondent's brief in the Court of Appeals on the basis that Respondent "lied." Was it well considered? Petitioner considers it important to challenge the ethic by which proceedings are conducted. How could the judicial process not be construed as a license for theft if a party is allowed to argue at will?

Lawyers ought not be allowed to lie with impunity in judicial proceedings. It is not enough that "ethical" considerations be reviewed by a state bar disciplinary committee. The ability to employ false argument affects a litigant's right to honest open consideration. The same may be said of diversionary legal argument or legal white lies. Not any argument, only argument based upon rigorous analysis of law, should be heard in court. To allow legal proceedings to proceed other than in deliberate fashion according to law undermines the integrity of the profession. It also undermines the process.

Ought law to allow empty legalism? Devious is devious but the marvel is how much the dictates of legal purposes constitutes devious legal purposes. One finds empty legalism in Mississippi highway deeds. They contain a clause that purports

to pay for causing flooding. How is it that the State of Mississippi can acquire the right to flood private property and not have to pay for the land the State has the right to flood? How else would one calculate the unknown damages of unplanned flooding?

When one examines the 1941 deed in this case with the intent to look beyond the dynamics of presumptions, one finds in the deed a bed of promises generated by pipeline company lawyers. The pipeline company "agrees" to bury its pipeline so as not to interfere with cultivation. The pipeline company "agrees" to pay for damages to growing crops. How generous!

Generosity is not the word for it. Empty legalism or unbridled lawyering is more fitting when it comes to interpretation after the fact. Lawyers were not imposing a real burden upon their client pipeline company. The promises are not contractual, as is commonly assumed, but rather selective recitations of obligations the pipeline company owes the fee owner in law. They do not constitute true contractual terms. The obligations do not disappear if not written in the deed. The law of correlative rights imputes the obligations.

Correlative rights are reserved rights. They are not contractual in nature. They are what was not in the contract. With correlative rights there is no deed, no grant, no contract, only a reservation of what is already owned and continues to be

possessed.

How is it that the Petitioner should not actually worry about shortcomings in the judicial system? This is not a perfect world. The judicial system will never be perfect. And Petitioner has the right to have a say on appeal. But there is the problem. The right to a say on appeal counts for little if the courts can ignore what is said by indulging generalities and rationalization, if in other words the courts do not have to address the issues presented in determinative rational terms.

One must lament a towering truth about the appellate process. Lawyers are not disciplined in their thinking. The lack of discipline referred to tracks to the courtroom. Jurists allow lawyers to argue whatever they choose. Jurists perpetuate the lawyers' shortcomings. Jurists too take shortcuts. They too indulge in generalities and rationalization. It is not the exception to the rule. It is the common everyday routine. Oral argument allows for some correction but does not get to the problem. In truth, the appellate process is not designed to accommodate argument generally, only arguments in law.

From the start Petitioner demanded that the Koch lawyers do right by people generally. It had to do with the ethic of law, with the integrity of law, with the purity of law, with law not being abused, with legal process not being a tool of oppression or a license for theft. Was this just talk?

Who can say the Petitioner has had due process? How can due process be defined if not in terms of the right to know, the right to ask questions, the right to get answers? How can law be defined other than in intelligible terms? How can courts proceed other than with a proper predicate in law? How can courts assume general authority and not overstep the bounds of limited government set forth in the constitution.

The constitution is a living document, it is often said. Petitioner shares an identity with the founding fathers of the nation, the identity of "We the People." He is not everyone, just one. His identity is real and rational, one shared by all and enjoyed by each. It is the identity of one for whom general powers to act are reserved by the living deed.

Petitioner has general powers to act. Petitioner is a real person, a live living creature, in an unqualified literal sense. The court is a legal person. The court has no general powers to act. The court must act in a limited fashion, according to law.

Petitioner has raised 4 issues. In varying degrees the courts have ignored the issues. By what authority in law do the courts ignore the issues? How is the Petitioner not denied the privileges and immunities of limited government and the rule of law? What respect did the courts have for law? How is law in this case not a taking?

How is law as interpreted in the 20th century not a license for theft? How is a law license to practice in any court in the land not a right to plunder and abuse people? How is an appointment or election to judicial office in the United States not a platform to wage political campaigns and exercise political power and control the moral behavior of society?

Reference can easily be made to specifics. One looks at the constitution and finds particular constitutional provisions. DO NOT TAKE what belongs to others. But there is a larger dimension. Law has purpose, illuminating purpose. One can look to the purpose for the specific provision against taking private property to see specifically how law in general works. That purpose was the same reason the founding fathers put an express provision in the document to reserve general powers to the grantors. There was concern that government be limited, that provision be made to pre-empt the exercise of unspecified powers. Unspecified powers were meant to be unwarranted. Only specified powers were to be included in the grant. Why? The reason was in Reason, in the desire not to be ruled by men but by law. Law was by design to be limited, rational, open, discernible according to the logic of its origins.

What a difference the origins of one's view makes. Mississippi courts have actually construed easement rights in favor of their biggest source of campaign contributions and in favor of their

biggest source of all-expense-paid junkets for jurists. Is the court's take on the case not judicial favoritism? The injunction rule here is Thou shalt not interfere with the big boys, the pipeline companies. Not the slightest interference is allowed. The big boys enjoy every convenience in the use of the little guy's land. The doors to the courthouse are shut.

Mississippi courts cannot dispute this. The grounds to say differently are the grounds of law. Mississippi courts are left defenseless by their judicial error. They cannot truthfully say that law dictated the judgment. They failed to take into account a different view of the case, one that demonstrates that the Koch view indulged generalities.

Why has the pipeline company been treated so favorably and the Petitioner been unable to get a word in edgewise? No one was listening to what the Petitioner had to say. No one was making an effort to take the journey of law, to understand life on its own terms.

CONCLUSION AND PRAYER

Petitioner contends that state courts, federal courts and especially the court that oversees for the citizens of the land the integrity of law have cause to pause and reflect about the implications of this case. A lot of advances in understanding has taken

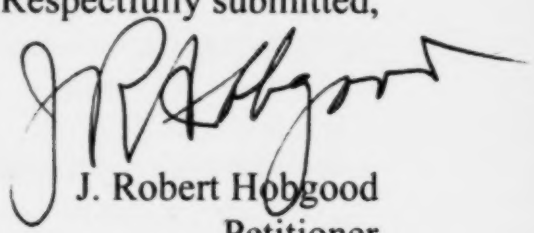
place since Justice Holmes uttered his pronouncements about logic and law and life in *The Common Law*. Law is rational. Law must be defined in terms of the vitality of life, as Justice Holmes suggested, and not allow itself to be consumed by empty logic, but this case shows that there is more to pragmatic views of law than a casual embrace of plain truth.

DNA evidence will not cure all that ails the judicial process in America. Law is in need of rethinking its conception of legal authority in the light of methodological **underpinnings**. It is necessarily so. Law is rational in that way. It is known by its pursuit of what is necessarily so.

Among the reasons stated above is just cause for this petition to be granted.

Petitioner asks that certiorari be granted.

Respectfully submitted,



J. Robert Hobgood
Petitioner

APPENDIX A

IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 1999-CP-00392-COA

J. ROBERT HOBGOOD

APPELLANT

v.
KOCH PIPELINE SOUTHEAST, INC.

APPELLEE

DATE OF TRIAL COURT JUDGMENT: 02/12/1999

TRIAL JUDGE: HON. THOMAS WRIGHT TEEL

COURT FROM WHICH APPEALED: HARRISON COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT: J. ROBERT HOBGOOD, PRO SE

ATTORNEYS FOR APPELLEE: HARRY R. ALLEN
JAMES L. HALFORD

NATURE OF THE CASE: CIVIL – REAL PROPERTY

TRIAL COURT DISPOSITION: COURT SUMMARY JUDGMENT IN FAVOR OF KOCH PIPELINE SOUTHEAST, INC.

DISPOSITION: AFFIRMED – 03/21/2000

MOTION FOR REHEARING FILED:

CETIORARI FILED:

MANDATE ISSUED:

BEFORE SOUTHWICK, P. J. LEE, AND MOORE, JJ.

SOUTHWICK, P.J., FOR THE COURT:

&&1. A pipeline company owning an easement brought suit for an injunction to prevent the landowner from interfering with replacement and use of the pipeline. The landowner counterclaimed for trespass and damages. What was labeled a partial summary judgment was entered, granting the pipeline company an injunction to permit full use of the easement. As to the counterclaim, the court ruled that it was inadequately-pled but that the defendant would have thirty days to amend. Absent an amendment, the counterclaim would then be dismissed as well.

&&2. The landowner filed a notice of appeal without accepting the trial judge's invitation to amend. On appeal the landowner alleges that the easement was improperly interpreted to permit upgrading, that he is entitled to damages, that his due process rights have been violated, and that the pipeline must be buried more deeply. We initially

hold that by not amending the defendant elected to stand on his original counterclaim. That election converted the partial summary judgment into a complete resolution of all issues and thereby a final judgment. We find no error and affirm.

FACTS

&&3. J. Robert Hobgood, a resident of Houston, Texas, inherited the property in question from his mother, who in 1941 granted to Koch's predecessor in interest, United Gas Pipe Line Company, an easement to build a pipeline for transporting natural gas. In 1942, Mrs. Hobgood gave United a new easement for a second pipeline. A 1958 agreement amended the first two easements and allowed for a third pipeline. Each document was executed by Hobgood's mother and duly recorded in the Harrison County land records. Pursuant to the 1941 and 1942 agreements, United built two twelve-inch pipelines. Part of the consideration for the easements was the right of those living on the property to tap into them to obtain natural gas for household use. That agreement was honored.

&&4. The 1941 and 1942 easements, as amended by the 1958 agreement, conveyed to the grantee and its successors the right to construct, maintain and operate pipelines, with the right of ingress and egress to permit enjoyment of those rights, and to allow for replacement of the pipelines. The 1958 agreement directed United to pay the Hobgoods one dollar per lineal rod for any additional pipeline. Under this agreement, United built a third pipeline in close proximity to the 1941 pipeline. The 1941 and 1958 pipelines were still in operation when this lawsuit was filed.

&&5. Koch Pipeline Southeast, Inc. succeeded to United's rights to the 1941 pipeline. Koch notified Hobgood that it

intended to begin replacing that line with a new, twelve-inch steel pipeline to be constructed, operated and maintained within the governing regulations set by the Federal Energy Regulatory Commission. The substance to be transported through the new pipeline is wet natural gas containing liquefiable components which later will be separated and processed into propane, butane and ethane. Koch committed to provide residents of the property with dry natural gas for household purposes from another pipeline. Hobgood instructed Koch not to come on his property to construct the replacement pipeline. Koch sought an injunction so that it could proceed.

&&6. Koch was granted a temporary restraining order. On February 12, 1999, the court granted Koch's motion for summary judgment. The judgment granted all of Koch's requested relief, dismissed Hobgood's counterclaim for his own injunction and to find a trespass. The court then stated that because "the matter was inexpertly pled and not otherwise addressed in any other pleadings by either party," it would not yet dismiss Hobgood's counterclaim for damages. Instead, the court allowed Hobgood thirty days from the date of judgment to file an amended counterclaim for damages. Hobgood did not file an amendment, but instead on February 22, 1999, he filed a Motion for Rehearing and Trial. This was denied by the court in an order dated May 17, 1999. That is the last order issued by the trial court.

&&7. Hobgood, a former attorney in Texas, appeals pro se from this judgment.

DISCUSSION

I. Existence of a Final Judgment

&&8. Before the issues raised by Hobgood can be considered, we must decide whether the appeal is properly before us. The decision from which this appeal was taken is entitled "Partial Summary Judgment." It completely resolved the issues on Koch's complaint, but left open for thirty days Hobgood's right to amend his counterclaim to state a proper cause of action for damages. Hobgood's motion for reconsideration of that judgment was denied.

&&9. No amended complaint was filed, but neither was there entered an order dismissing the counterclaim because of that failure. No entry of a final judgment was sought as to the claims that were resolved. M.R.C.P. 54(b). No approval for an interlocutory appeal was obtained. M.R.A.P. 5 (a). We have an acceptance in fact by both parties that the matter is ripe for our consideration. We must determine if in law that is true.

&&10. Absent permission requested and granted for an interlocutory appeal, an appellant may only seek review of a final judgment. Luther T. Munford, Mississippi Appellate Practice (1997) " 6.1. A partial summary judgment is of course not an adjudication of all the claims. See M.R.A.P. 54(b). The procedural requirements for an interlocutory appeal were not followed. [1] M.R.A.P. 5 (a)-(c); Munford, Appellate Practice, "" 4.3 - 4.4.

&&11. When a violation of an appellate rule has occurred, we may suspend the effect of that rule "in the interest of expediting decision, or for other good cause"; however, suspension may not waive "the time for taking an appeal" under either Appellate Rule 4 or 5. M.R.A.P. 2(c). An interlocutory appeal requires the filing of a petition with the trial court within fourteen days, seeking the right to appeal from a non-final order. The summary judgment was dated February 12; the notice of appeal was filed February 25, but

no petition arguing the reasons for granting an interlocutory appeal was then or ever filed. Would suspending the rules here constitute a waiver of the time for taking the appeal or only a waiver of the intricacies of the method? If the threshold requirement for suspending the rules here is only that something has been filed that seeks an appeal, that occurred. The notice was filed less than 14 days after the judgment. The wrong form of appeal was filed within the time for the correct form of appeal.

&&12. This Court at least twice has concluded that we may suspend the rules for interlocutory appeals even when no petition for such an appeal has been filed. Ann May Enterprises, Inc. v. Caples, 724 So.2d 1127, 1130 (Miss. Ct. App. 1998); McGriggs v. Montgomery, 710 So.2d 886, 888 (Miss. Ct. App. 1998). We find only one decision in which the supreme court permitted a suspension of the rules for interlocutory appeals, saying without elaboration that a criminal defendant had "perfected this interlocutory appeal through imperfect process." Keyes v. State, 708 So.2d 540, 542 (Miss. 1998).

&&13. We need not decide what short of the steps taken in this case may be necessary to pass the threshold for suspension purposes. We find that the reasons for permitting an interlocutory appeal exist -- to decide this appeal now will significantly "advance the termination of the litigation and avoid exceptional expense to the parties" that would be occasioned by dismissing the appeal. M.R.A.P. 5(a). Since a notice of appeal under Rule 4 was filed within the deadline for filing a petition requesting an interlocutory appeal under Rule 5, suspending the rules here does not constitute an improper extension of the time for taking an interlocutory appeal. We are only waiving the intricate procedural obligations on the party seeking such an appeal.

&&14. The imperfections of the procedures followed by the appellant create an additional problem. If this is an interlocutory appeal, this means that part of the suit is still pending in the trial court. We are faced with determining what if anything is pending. The partial summary judgment of February 12, 1999, gave in effect a Rule 12(b)(6) dismissal. M.R.C.P. 12(b)(6) (rule applies to any "claim, counterclaim, cross-claim, or third-party claim. . . ."). The court found that no proper counterclaim for damages was pled. Instead of dismissing outright, the court gave Hobgood thirty days to amend. That in fact was required, as Rule 15 states that upon granting a 12(b)(6) motion the trial court must permit an amendment within thirty days. M.R.C.P. 15(a).

&&15. What if nothing thereafter occurs? The official comment to Mississippi Rule 12 states that if a complaint or a counterclaim "is dismissed with leave to amend and no amendment is received, the dismissal is a final judgment and is appealable" unless other claims remain unresolved. M.R.C.P. 12 cmt. To be precise, though, the judge here did not dismiss with leave to amend. He announced that he would dismiss unless an adequate amendment was received. We find this to be an unimportant distinction. In neither situation is the order on its face final; instead it is contingent with an obvious result upon failure of that contingency.

&&16. We find no interpretation of this exact point from the Mississippi Supreme Court, though the already quoted comment from Rule 12 is close. We have found a persuasive statement from a federal appellate court. The district judge found that fraud was not properly pled in a complaint; instead of dismissing, he granted leave to amend. The order said that if no amendment was filed in thirty days, "the court will entertain a renewed motion to dismiss." Shapiro v. UJB

Financial Corp., 964 F.2d 272, 278 (3d Cir. 1992). The plaintiffs never amended nor did the trial court ever formally dismiss. The plaintiffs did, however, announce that they would not amend. Id. The appellate court said that it was clear that the trial court would dismiss any claims not amended. The court reasoned that to reject the appeal because of the failure to have a formal dismissal of the complaint would elevate form over substance: "once the amendment period expired, the district court's order had the effect of dismissing the improperly pleaded claims with prejudice." Id.

&&17. We adopt that analysis here. The trial court announced that it would dismiss without prejudice the counterclaim unless it was amended within thirty days. No amendment was made, and the party whose claim was to be dismissed instead appealed. That is the equivalent of announcing that it would stand on the claim as drafted.

&&18. When a party is given an opportunity to amend and the trial court has stated that dismissal will occur otherwise, the failure to amend and the seeking of an appeal abandons the opportunity. Once the thirty days passed and Hobgood pursued his appeal, the partial summary judgment, partial only because the opportunity to amend remained open, became a complete and final judgment. Hobgood's counterclaim was therefore dismissed without prejudice.

&&19. The appellant made his procedural bed and may not complain that it is untidy. No harm to the appellee appears from our implication that what should have been done was done. In fact, neither party objects on this appeal. Nonetheless, this Court must assure itself of its own appellate jurisdiction. We find that permitting this appeal to proceed is within our authority.

II. Interpretation of the Granting Clause of the Easement .

&&20. The 1941 easement granted to Koch's predecessor in interest the following rights:

. . . the right of way and easement to construct, maintain and operate pipe lines and appurtenances thereto, and to construct, maintain and operate telegraph and telephone lines in connection therewith, together with the necessary poles, guy wires and anchors, over and through the following described lands situated in Harrison County, State of Miss. . . . .

. . . To have and to hold unto said Grantee, its successors and assigns, so long as such lines and appurtenances thereto shall be maintained, with ingress to and egress from the premises, for the purpose of constructing, inspecting, repairing, maintaining, and replacing the property of Grantee above described, and the removal of such at will, in whole or in part.

The said Grantor is to fully use and enjoy the said premises, except for the purpose hereinbefore granted to the said Grantee, which hereby agrees to bury all pipes to a sufficient depth so as not to interfere with cultivation of soil, and to pay any damage which may rise to growing crops or fences from the construction, maintenance and operation of said pipe, telegraph and telephone lines. . . . Should more than one pipe line be laid under this grant at any time, the sum of twenty-five cents per lineal rod for each additional line shall be paid, besides the damages above provided for.

. . . [The right of way] shall not exceed thirty feet in width. . . .

&&21. The 1942 agreement added the right to construct another pipeline. The 1958 agreement changed the payment

due to the grantor from twenty-five cents to one dollar per lineal rod of additional pipeline laid, stating that except as specifically amended by the 1958 agreement, the 1941 easement remained in effect. The 1958 agreement also widened the original thirty-foot right of way to fifty-five feet.

&&22. The issue concerning the interpretation of the granting clause of the easement was framed by Hobgood in his brief as follows: "Whether the language in the granting clause of an easement deed, (in particular, the phrase 'the right of way and easement to construct, maintain and operate pipe lines and appurtenances thereto') entitled the pipeline company as a matter of law to an unqualified use of the right of way for pipeline purposes, including the right to install whatever number of pipe lines it chooses whenever it chooses for transporting whatever products it chooses, unless the language of the easement deed elsewhere expressly limits the use of the right of way."

&&23. Hobgood appears concerned with both the number of pipelines permitted on the easement as well as the permissibility of changing the product that can be transported.

&&24. In construing the language of an easement, the rules for the interpretation of deeds and other written instruments apply. Boland v. Natural Gas Pipeline Co. of America, 816 S.W.2d 843, 844 (Tex. App. 1991). An instrument that is clear, definite, explicit, harmonious in all its provisions and free from ambiguity must be given effect. Pursue Energy Corp. v. Perkins, 558 So. 2d 349, 352 (Miss. 1990). The courts rely on the "four corners doctrine." Under that doctrine, "an instrument is considered as a whole, in order to ascertain the intention of the parties . . . . In other words, an instrument should be construed in a manner 'which makes

sense to an intelligent layman familiar only with the basics of English language.'" Id.

&&25. Only if a contract or deed is ambiguous within its four corners will construction of those provisions involve triable issues of fact. Shelton v. American Ins. Co., 507 So. 2d 894, 896 (Miss.1987). We do not find the present granting clause at all ambiguous.

&&26. The 1941 easement agreement granted an "easement to construct, maintain and operate pipe lines " (emphasis added). That agreement and the 1958 agreement also arrange for payment per lineal rod for additional pipelines that might be constructed in the future. The only limiting language in the agreement restricts the pipeline company to a specified fifty-five-foot-wide area for laying pipeline and other necessary lines, such as telephone and telegraph lines. There is no allegation that replacing the twelve-inch 1941 pipeline with a new twelve-inch pipeline violates that restriction.

&&27. The Mississippi Supreme Court has ruled that a temporary injunction granted to a pipeline company to prevent an owner of the servient estate from interfering with the construction of additional lines of pipe was properly granted where the agreement, like the present one, allowed for payment of one dollar per lineal rod of additional pipeline. Ashcot, Inc. v. Texas Eastern Transmission Corp., 241 Miss. 392, 396, 129 So. 2d 405, 407 (Miss. 1961). "Right-of-way instruments, with substantially the same provisions as the one for consideration by the Court in this instance, have been construed by courts in other jurisdictions. With one accord, they have held that such instruments were not vague and indefinite; and that the grantees therein had the right, under such agreements, to lay and construct additional pipelines." Id.

&&28. The recorded easements give Koch the right to replace the pipeline that runs underneath Hobgood's land as well as the right to maintain and repair it, together with ingress and egress necessary for that purpose. There is no material issue of fact to be determined by a jury with respect to the meaning of the agreement.

&&29. Hobgood also is concerned that the substance to be carried by the new pipeline will be natural gas in a different form from that carried by the old pipeline. He wants to investigate and introduce evidence of "what right of way agents told people" about what would be carried in the pipelines back in 1941. Most of that information may be inadmissible hearsay, but it certainly is parol evidence that cannot vary the plain language of the easement. The fact that the new pipeline will carry a liquefied form of gas is not relevant under the terms of the agreement. Koch has also made arrangements for residents of the property to continue receiving natural gas in a form appropriate for household use, so no change to that right is occurring.

&&30. In a factually similar case, the Supreme Court of Ohio found that a pipeline company was not limited in the types of petroleum products it could transport through a pipeline where the original contract contained no such limitation. Alexander v. Buckeye Pipe Line Co., 374 N.E.2d 146, 151 (Ohio, 1978). In that case, right-of-way agreements executed in 1911 and 1947 allowed for transport of "oil" and "gas," and the property owners argued that this meant only crude oil and natural gas could be transported through the pipelines, not fuel oil, gas oil, propane and butane, or other gasoline products. "Because there is no language contained in the 1947 agreement which specifies or limits which products or substances may be transported, it follows that appellee is not limited in the kinds of products it may

transport through the pipe line installed under this agreement." Id. It also found the terms "oil" and "gas" to be unambiguous and so would not allow extrinsic evidence to be introduced to determine their meaning. Id.

&&31. In the present case, the fact that the 1941 pipeline was constructed to carry one form of natural gas does not prevent Koch from transporting another form of natural gas in that line or any additional line built on the easement. The servient estate does not suffer an additional burden as a result of the transport of natural gas liquids as opposed to dry natural gas. See F. E. Ball v. American Telephone and Telegraph Co., 227 Miss. 218, 226, 86 So. 2d 42, 44 (Miss. 1956) (holding that telephone company was not restricted from using its telephone and telegraph cable lines for television transmission, as no additional burden was placed on the servient estate by such transmission).

&&32. The trial court properly found that there was no issue of material fact concerning the nature of the substance that could be carried by the pipeline under the agreement.

III. Hobgood's Right to Damages

&&33. Because Hobgood's right to any damages was "inexpertly pled and not otherwise addressed in any other pleadings by either party," the trial court allowed Hobgood thirty days to amend his counterclaim. As we have held, the effect of Hobgood's failure to amend was to cause the dismissal of that claim without prejudice. There is nothing for us to review.

IV. Existence of a Due Process Violation

&&34. Hobgood argues that his due process rights were violated because he was not allowed time to develop the facts of the case properly before the court heard Koch's

motion for summary judgment. Koch filed the original complaint on October 26, 1998. Its motion for summary judgment was filed on December 30, 1998. The hearing on Koch's motion was held on February 4, 1999. A summary judgment motion is proper "at any time after the expiration of thirty days from the commencement of the action. . . ." M.R.C.P. 56(a).

&&35. A party may defend against summary judgment by presenting affidavits that prove "that he cannot for reasons stated present by affidavit facts essential to justify his opposition"; the result of such proof is that the trial court should continue the case to allow discovery to develop further. M.R.C.P. 56(f). The record shows that Hobgood propounded no discovery during the three months between the filing of the complaint and the hearing on summary judgment. The need for additional time as allowed under this rule is not proven merely through allegation:

However, the party resisting summary judgment must present specific facts why he cannot oppose the motion and must specifically demonstrate "how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact." United States v. Little Al, 712 F.2d 133, 135 (5th Cir.1983)

Marx v. Truck Renting and Leasing Association, Inc., 520 So.2d 1333, 1343-44 (Miss. 1987). This exception in Rule 56 may not be used to avoid diligence in pursuing formal discovery; "normally the party invoking Rule 56(f) must show what steps have been taken to obtain access to the information allegedly within the exclusive possession of the other party." Id. at 1344. No such showing was even attempted, much less made. In Marx, five months passed without the defendant's attempting any discovery. Id. In this

case, Hobgood never sought any discovery, not after filing his answer nor after being served with the summary judgment motion.

&&36. Instead of seeking discovery, Hobgood stated in his response to summary judgment that Koch "has in its possession documents which it has refused to make available voluntarily" that landowners were told years earlier that this pipeline would only transport natural gas. That response was filed January 30, 1999, four days before the hearing on the motion. Even with that response, he sought no discovery. What he did, to paraphrase the language of Marx , is to show that he had taken no steps to obtain access to information that he alleges Koch possessed.

&&37. Assertions appear in Hobgood's appellate brief indicating what he hoped to find if given more time to begin the search. He speculates that "just maybe, Koch may be hiding from its own attorneys, the Appellant and the Court a deed executed by Mrs. Hobgood that was not filed of record, say a deed that has been rewritten to limit the pipeline to natural gas." It is stated that "one landowner got United Gas Pipeline Company to put it in his deed what its right of way agents were saying orally, that the pipeline would carry natural gas and nothing else." He does not name that landowner nor provide a copy of what would prove this assertion. Hobgood seeks the original of the right of way deed in order to discover if it has "notes or erasures," or even just staple marks that would show what might have been a limitation on use once was attached. "Koch cannot prove no staple holes with a copy," he argues. He desires to locate former United Gas Pipeline Company employees to investigate whether there was any fraud. Another appellate speculation is that Koch "may be hiding copies of correspondence or corporate resolutions that would constitute evidence in support of one or another defense to

the Koch claim."

&&38. The procedural rules entitle a party to file for summary judgment after thirty days have passed. A trial judge should exercise discretion to refuse summary judgment if a valid, good faith reason for further discovery is shown consistent with the Rules. M.R.C.P. 56 (f). As part of that exercise of discretion, the trial judge must have proof of diligence by the party seeking delay. Here there has been no diligence and at most only speculation of what might be uncovered.

&&39. Finally, what Hobgood alleges may be found by discovery is evidence that certain statements were made to landowners in 1941 or perhaps 1958 when these easements were acquired. The only important thing is what Mr. Hobgood's mother herself agreed when she executed the easement and supplementary documents beginning in 1941 and ending in 1958. Absent fraud, the agreement itself is the statement of the terms that are binding on both parties. What in essence Hobgood must argue is that fraud caused a different conveyance of interests in property to be recorded than his mother had intended to execute. Hobgood's counterclaim did not allege fraud, but only "disputed Plaintiff's claims of entitlement under a 1941 pipeline easement. . . ."

&&40. Had fraud properly been alleged, then presumably the appropriate statute of limitations would have been interjected as an affirmative defense. That statute requires the action to be brought within ten years, subject to that limitation's period being tolled if there is concealed fraud. Miss. Code Ann." 15-1-9 (Rev. 1995). The alleged fraud here would be at least forty and perhaps sixty years of age. It relates to a recorded instrument. The supreme court has addressed fraud in such circumstances:

The fact that the deed was duly of record prevents the rule of concealed fraud applying, for this court has said in the case of Adams v. Belt, 136 Miss. 511, 100 So. 191, at p. 194, that the rule of concealed fraud can not apply to those things that are of public record.

McMahon v. McMahon, 247 Miss. 822, 834, 157 So.2d 494, 500 (1963).

&&41. Hobgood's request for more time to find information fails at two levels. First, Hobgood was afforded adequate opportunity to begin the search for information from Koch and never did so. Secondly, even if he found what he speculates exists, it would avail him nothing.

&&42. There was no denial of due process in granting summary judgment.

V. Obligation of Koch to Bury the Pipeline Eight Feet Deep

&&43. Hobgood asserts that Koch must bury the new pipeline eight feet deep "to accommodate reasonable uses of the subservient estate," including the potential growth of the area. Again, we are faced with interpretation of an unambiguous agreement between the two parties whose successors in interest are before the court. The 1941 agreement as amended in 1958 specifies that the pipelines should be buried at a sufficient depth so as not to interfere with cultivation and planting of the land. The new pipeline is to be buried at a depth of thirty-six inches, slightly deeper than the 1941 pipeline, which has not been shown to have interfered with any cultivation of the land.

&&44. The agreement provides for a specific measure of depth, namely, one that does not interfere with cultivation and planting. Should a different planned use of the land

require the pipeline to be buried more deeply, that is a matter for Hobgood to seek to resolve with Koch as an amendment to the agreement. Such a change is not something that this Court can force upon either party.

&&45. THE JUDGMENT OF THE CHANCERY COURT OF THE SECOND JUDICIAL DISTRICT OF HARRISON COUNTY IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANT.

McMILLIN, C.J., KING, P.J., BRIDGES, IRVING, LEE, MOORE, PAYNE, AND THOMAS, JJ., CONCUR.

1. On January 4, 2000, a motion from Hobgood was received at this Court "to certify the nature of the appeal in accord with Rule 5. . . ." That was filed over eight months after the judgment from which the appeal is sought. This motion does not comply with the interlocutory appeal procedures and would not itself permit the grant of such an appeal. Considering our ruling, we by separate order dismiss the motion as moot.

APPENDIX B

IN THE CHANCERY COUR OF HARRISON COURTY,
MISSISSIPPI
SECOND JUDICIAL DISTRICT

Koch Pipeline Southeast, Inc.
Plaintiff

vs. #C2402
98-1140

J. Robert Hobgood
Defendant

Order for Partial
Summary Judgment

Came for hearing on February 4, 1999, upon the various motions of the parties, and the court having heard the parties oral argument, reviewed their pleadings and reviewed cited case law, does hereby find, order and adjudge as follows:

1. The Court finds jurisdiction over the parties and subject matter.

Pleadings

2. Plaintiff, Koch Pipeline Southeast, Inc., a Kansas corporation qualified to do business in Mississippi, filed its "Verified Complaint for Temporary Restraining Order, Preliminary Injunctive Relief, and Related Relief" on October 26, 1998. Therein, Koch made a cursory

deraignment of title, noted the pertinent parts of its recorded easements, noted its intention to replace a pipe existing in the easement, noted Mr. Hobgood's instructions not to come on his property, and then requested an injunction against Mr. Hobgood.

3. Plaintiff Koch then filed its October 28th Motion for Preliminary Injunction" and "Motion for Temporary Restraining Order".

4. After a hearing on October 28th, Judge William Stewart granted the Temporary Restraining Order against Hobgood and directing Plaintiff Koch to post a $5, 000 bond.

5. Defendant J. Robert Hobgood, a Texas resident who inherited the parcel in question from his parents, filed his pro se, "Defendant's Original Answer" on November 9, 1998, generally denying the relief requested and asserting generally as follows: "By way of counterclaim Defendant alleges trespass, injunction and damages."

6. Plaintiff Koch filed its November 20th "Answer to Counterclaim", denying the general assertions of Mr. Hobgood.

7. Plaintiff Koch next filed its "Motion for Summary Judgment" on December 29, 1998. Therein, Koch asserts that its relief is based on recorded easements, that the easements allow for replacement of pipe lines, and its factual situation falls within M.R.C.P. 56 guidelines.

8. On February 4, 1999, Plaintiff argued its case under Rule 56.

9. Defendant Hobgood stated that he had filed motions which he wanted to argue; however, after investigation b the Court and the court clerks, the motions were mailed by Mr. Hobgood on Saturday, January 30, 1999, but to the First Judicial District Courthouse, and were not in the court file. The Court did address Mr. Hobgood's motions. One sought a continuance, noting the Plaintiff had

not provided requested documentation, however, Defendant Hobgood had not filed interrogatories, motions to produce, admissions, sought a deposition, or otherwise exercised his rights under the Mississippi Rules of Civil Procedure.[1] The other complained of the Plaintiff's affidavits, arguing that they were incomplete, however, Defendant supplied no counter-affidavits of any kind. Generally, one of the above pleading asserted that there was a difference between natural and liquid gas.

10. The Court denied the continuance as no discovery had been attempted by Defendant.

The Law on Summary Judgment

11. A Motion for Summary Judgment is governed by M.R.C.P. Rule 56 (c), which provides in pertinent part as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

12. Case law makes the procedure clear. The Trial Court must view the evidence in the light most favorable to the party against whom the motion has been made. **Russell v. Orr**, 700 So.2d 619, 622 (Miss. 1997); **Northern Elec.**

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[1] Mr. Hobgood seemed to assert that he had requested Koch to provide all deeds, letters and other correspondence between his parents (the original landowners) and the company; further, it appeared that the request was informal; thereafter, the Court noted that his complaints did not fall within the Rules of Civil Procedure.

Co. v. Phillips, 660 So.2d 1278, 1281 (Miss. 1995). The burden of showing that no genuine issue of material fact exists lies with the moving party, and the benefit of every reasonable doubt is given to the party against whom summary judgment is sought. **Tucker v. Hinds County**, 558 So.2d 869, 872 (Miss. 1990). If the party opposing the motion is to avoid entry of an adverse judgment, that party must bring forth evidence which is legally sufficient to make apparent the existence of triable fact issues. **Id.** Summary judgment is mandated where the nonmoving party fails to show evidence sufficient to establish the existence of an essential element to his case. **Wilbourn v. Stennett, Wilkinson & Ward**, 687 So.2d 1205, 1214 (Miss. 1996). As noted in M.R.C.P. 56(e): an adverse party may not rest upon the mere allegations or denials of his pleadings."

13. This process is not to try issues, but to determine whether there are material issues to be tried. **Townsend v. Estate of Gilbert**, 616 So.2d 333 (Miss. 1993). In defining a "material" fact in the context of summary judgments, the Mississippi Supreme Court has stated that "[t]he presence of fact issues in the record does not per se entitle a party to avoid summary judgment. The court must be convinced that the factual issue is a material one, one that matters in an outcome determinative sense." **Simmons v. Thompson Mach. of Miss**, 631 So.2d 798, 801 (Miss. 1994)(quoting **Shaw v. Burchfield**, 481 So.2d 247, 252 (Miss. 1985).

14. Furthermore, it is well-settled that motions for summary judgment are to be viewed with a skeptical eye, and if a trial court should err, it is better to err on the side of denying the motion. **Aetna Cas. And Sur. Co.**, 669 So.2d at 70 (Miss. 1996). Needless to say, a granted summary judgment is a rare creature and one upheld on appeal is akin to an endangered species.

The Nature of the Easement Granted Koch

15. An easement is a "right of use over the property of another,... a right in the ownership of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not consistent with the general property in the owner." **Rowell v. Turnage**, 618 So.2d 81 (Miss. 1993), citing Black's Law Dictionary (5th ed. 1974). The easement owner (dominant estate) and property owner (servient estate) have corresponding duties to use the property in a manner which does not interfere with the other's utilization. See, **Rowell**, citing **Feld v. Young Men's Hebrew Ass'n**, 208 Miss. 451, 44 So.2d 580 (1950); 2 Thompson on Real Property, 584 p. 190 (Permanent Ed.) Further, the dominant estate has the right to be free from even minor interference which makes the easement use less convenient and less beneficial. 28A C.J.S. Easements §177.

16. However, as in most such cases, Mississippi engrafts common sense reasonableness to these rights. For instance, in **Lindsey v. Shaw**, 210 Miss. 333, 49 So.2d 580 (Miss. 1950), a farmer did not have to remove his gate across the easement, but he could not nail it shut or lock it. Further, in **Feld v. Young Men's Hebrew Assn. Of Vicksburg**, 208 Miss. 451, 44 So. 2d 538, the Court stated "The owner of the soil retains full dominion over his land subject merely to the right of way. He may make any use of his land which does not interfere with a reasonable use of the way." (Emphasis added).

Analysis of Plaintiff's Motion for Summary Judgment

17. Broadly, Plaintiff asserts that its 1941, 1942 and 1958 easements give it the right to replace the pipeline currently running underneath Defendant's land. Clearly, the recorded easements grant Plaintiff the right to maintain,

repair and replace the pipeline, together with ingress and egress for that purpose.

18. Defendant offered no statutes or case law or affidavits which rebut this assertion.

19. Defendant does assert, generally, that there is a difference between natural gas and "liquefied components of natural gas". The Court assumes that this an argument on the burden to the subservient owner, however, Defendant provided the court with no statutory, case law, expert opinion or even lay authority to support this position. The Court, however, did make a cursory search of West law and found no such authority.

Conclusion

20. The Court notes that this order operates as both a grant of Plaintiff's requested relief and a dismissal of Defendant's general counterclaim as to injunction and trespass, however, as the matter was inexpertly pled and not otherwise addressed in any other pleadings by either party, the Court, on its own motion, will not dismiss, at this time, Defendant's general pleading for damages. The Court notes that the easements do reflect a guideline for compensation.

21. Having reviewed the case law, the pleadings, and the arguments made by both counsel, the Court makes the findings above and the other below granting a partial summary judgment.

IT IS THEREFORE, ORDERED AND ADJUDGED, AS FOLLOWS:

1. ORDERED AND ADJUDGED, that the Plaintiff, Koch Pipeline Southeast, Inc. is granted summary judgment in the above styled cause; further, Defendant Hobgood is permanently enjoined from interfering with

Koch's construction of the replacement pipeline, and specifically enjoined from stopping, threatening, interfering with or impeding Koch or its contractors or agents from exercising Koch's rights under the 1941 Easement and the 1958 Agreement, including the right of ingress and egress for purposes noted in the easement, including maintenance and replacement of the pipe, as noted in the pleadings herein.

2. ORERED AND ADJUGED, that, as the matter of damages to the landowner was inexpertly pled and not otherwise addressed in any other pleadings by either party, the Court, on its own motion, will not dismiss this portion of the pleadings under this summary judgment; however, the Court shall order as follows:

a. Defendant has 30 days from this order to amend its counterclaim and to state his claim pursuant to Mississippi law and our rules of civil procedures;
b. Should Defendant not file an amended pleading within this 30 day period, this claim will be dismissed without prejudice.

ORDERED AND ADJUDGED, this the 12th day of February, 1999.

Chancellor

copies to:
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APPENDIX C

Mississippi Supreme Court
Hand Down Report
07/27/2000

EN BANC

1999-CT-00392-SCT

J. Robert Hobgood v. Koch Pipeline Southeast, Inc.

Harrison Chancery Court 2nd District;

LC Case#: 981140;

Ruling Date: 02/12/1999;
Ruling Judge: Thomas Teel;

Disposition: Petition for Writ of Certiorari filed by J. Robert Hobgood, denied.

To Deny: Prather, C.J., Pittman and Banks, P.JJ., McRae, Smith, Mills, Waller and Cobb, JJ. Not Participating: Diaz, J. Order entered.